UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

ACE EXPEDITERS OF ALABAMA, LLC

Employer

and Case 8-RC-16661

GENERAL TRUCK DRIVERS AND HELPERS
UNION LOCAL NUMBER 92, AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[1]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by the Employer working at its facility located at 4210 Whipple Avenue, Canton Ohio but excluding all office and clerical employees, and all professional employees, guards and supervisors as defined in the Act.

There are approximately 13 employees in the unit.

[1] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. [1] The parties filed post-hearing briefs, which have been carefully considered. Upon the entire record in this proceeding, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

I. Issues

The Employer asserts that the delivery drivers at issue do not comprise an appropriate unit because they are independent contractors, and, as such, are not employees within the meaning of Section 2(3) of the Act. The Petitioner contends that the drivers are employees under the Act and constitute an appropriate unit for purposes of collective bargaining.

II. Decision Summary

I have carefully considered the evidence, briefs, and the arguments presented by both parties. I have concluded that the factors militating in favor of a finding that the drivers are employees outweigh those indicating they are independent contractors. Accordingly, I find that the drivers are employees under the Act and I am directing an election in a unit of drivers.

III. Background

The Employer is an Alabama limited liability corporation with two facilities located in Orlando, Florida, providing transportation, warehousing and distribution services in 20 states. With respect to this petition, the Employer provides transportation and warehousing services for one customer, Advance Auto Parts, Inc., (Advance) from an Advance facility located at 4210 Whipple Avenue, Canton, OH. Ken Halbert is the Employer's President and Managing Partner. The Employer began servicing Advance in Canton, Ohio, in February 2002. Halbert testified that the Employer meets Advance's need for a reliable, expedited, and predictable delivery service. The approximately 13 drivers at issue here are responsible for transporting auto repair parts from the Advance warehouse to its retail stores or from one Advance retail store to another.

The Employer employs Ken Weber[2] as an on-site customer liaison who also works at the Whipple Avenue facility. He is responsible for interviewing and "contracting" with the delivery drivers and overseeing that the routes are run. He also assists in providing warehousing and transportation services by pulling orders and unloading trucks.

IV. Facts

A route consists of a sequence of Advance retail stores. The 13 drivers at issue are responsible for running six routes, twice a day, Monday through Saturday. The record reflects that while at least two drivers complete a route twice daily, several drivers complete just one route a day. Although routes vary in size, both by the number of stores,

[2] Weber, whom the Employer considers part of management, is apparently employed by the Employer through a professional employee leasing company. The parties stipulated that in the event the drivers are found to be employees, he should be excluded from any appropriate unit on the basis that he is supervisor within the meaning of the Act. Since there is no record evidence to the contrary, I accept the stipulation and exclude Weber from the unit.

and by geographic location, on average a route takes approximately two to four hours. All routes are in Ohio.

A driver generally runs the same route or routes each day. A driver picks up his load of automotive parts from the warehouse and delivers the parts to various Advance retail stores. The Employer has established specific starting times or "launch times" for both the morning and afternoon routes, based on the needs of Advance. Drivers responsible for completing morning routes are scheduled to leave the warehouse by 11:00 a.m. Drivers for the afternoon routes are scheduled to leave the warehouse by 2:00 p.m. Weber has telephoned drivers who are not at the warehouse shortly before the designated start times to determine their location because of his concern that the driver may not be ready to leave by the designated launch time. In addition, drivers are expected to reach each retail store by a scheduled time, predetermined by the Employer, according to Advance's needs. Indeed, if Advance does not pay the Employer due to a late delivery, the driver does not get paid. At the completion of a route, drivers must return to the Advance warehouse to drop off trip sheets.

The Employer, in compliance with the needs of Advance and without input from the driver, determines the number of stores on each route and the sequence in which the driver is to deliver the products. For example, the Employer determines that a driver must deliver product to store number 7451 first, and store number 1879, second, etc. However, drivers may choose the roads traveled to reach each store. Drivers cannot alter the route by adding or subtracting stores nor by changing the store sequence. The Employer, on the other hand, has unilaterally altered drivers' routes.

Before contracting with a driver, Weber conducts a prescreening and interview process. There is usually at least one telephone call and one meeting between Weber and the potential driver. During the phone conversation, Weber prescreens the potential drivers and will eliminate from consideration those with a history reflecting a DUI, a reckless operation infraction, or an excessive number of driving points. He also notifies them that the Employer considers drivers to be independent contractors. Before beginning work a driver completes a pre-application for an independent contractor position, a contract driver work questionnaire, an independent contractor application for contract operator agreement and, ultimately, signs a lease agreement.[3] This lease agreement, which is not routinely provided to the drivers, denotes that the driver is an independent contractor and not an employee.[4] These records, along with the driver's insurance information and a W-9 form, comprise a "vendor file," which the Employer maintains on each driver.

The Employer requires that the drivers utilize a minivan or pickup truck for their routes, but they can select any make and model of vehicle within those boundaries. Drivers are not required to display any Employer insignia on their vehicles. The

[3] Although the record is somewhat unclear, it appears that the Employer's advertisements seeking drivers calls for "IC's."

[4] Driver's Marie Sawyer and Kenneth Young testified that, despite repeated requests, Weber has not provided them with copies of their lease agreements.

Employer has no ownership interest in the vehicle used by the driver nor does it supply any financial assistance in obtaining a vehicle. Drivers are solely responsible for maintaining and insuring their vehicles. The driver pays for gas and tolls but the driver does receive a fuel surcharge when gas prices reach a certain level. This fuel surcharge is part of the contractual arrangement between the Employer and Advance. Pursuant to this agreement, Advance pays a fuel surcharge which the Employer passes on to the drivers. Drivers are also liable for products damaged in transit.

The Employer further requires that drivers have a cell phone and public liability and property insurance. The driver, however, is responsible for obtaining and paying for the cell phone and insurance. There is no requirement that drivers obtain collision insurance. The Employer neither provides training nor a handbook/manual to the drivers.

The Employer determines the amount of money a driver will earn for a particular route, which is about 60 percent of the amount the Employer charges Advance. It is clear that the driver has no control of the amount that is negotiated between the Employer and Advance. The Employer claims that a driver can negotiate compensation but failed to cite a specific example of a negotiation taking place at this location. Young testified that he recently asked Weber for more money for his route but Weber denied his request.

As an example of a common "negotiation" of rates between it and drivers, the Employer relies on the fact that at other locations when a major road on a driver's route is closed, thereby greatly increasing the route's length, it will assess the situation to see if the rate of pay is still correct. If the Employer determines the rate is incorrect due to this road closure, it notifies the customer and secures the customer's accommodation of a new rate. If the Employer determines that a pay rate increase is not warranted, the driver has the option of continuing to work for the Employer or terminating the lease.

The Employer pays drivers on a weekly basis. Weber completes daily logs showing which drivers completed routes, and submits these logs to the Employer's accounting department, which then prepares the "settlement checks." Weber, in turn, distributes "settlement checks" to the drivers. The Employer does not provide drivers with health insurance, retirement benefits, holiday or vacation pay, as it does with its admitted employees. It does not withhold any taxes, pay unemployment taxes nor does it contribute to workers compensation. The Employer charges a 2 percent administrative processing fee, which it automatically deducts from the drivers check, for generating a settlement report that accompanies the settlement check. This settlement report reflects the routes completed, compensation for each route, the fuel surcharge and the driver's gross compensation. Whether a driver gets paid for the entire route if it is not completed, because, for example, the driver's vehicle broke down, depends on whether the driver can arrange to get another driver to compete the route. If the assigned driver cannot complete the route, then the Employer will only pay the driver a certain percentage of the income the driver normally receives for that route. It appears this percentage is determined by the Employer, based on the number and location of stores that the driver was unable to service.

Pursuant to Advance's desires, the Employer mandates all drivers wear bright yellow shirts, preferably with the Employer's name on it, and an ID badge. Drivers are also expected to dress in a businesslike manner and are to forego wearing jeans and sneakers. It appears the Employer provides the shirt for each driver, at a charge, and the ID badge, at no cost.

The record is unclear as to each driver's length of service with the Employer. However, the two drivers who testified on the Petitioner's behalf have been with the Employer since it began servicing the Canton area. The Employer submitted settlement reports for 10 of its drivers dated September 28, 2004. It also submitted drivers' 1099 forms for the year 2002. A review of these records reflects that half of these10 drivers worked for the Employer in 2002. Moreover, Halbert testified that the turnover rate is very low for "dedicated route services," such as that which the Employer provides to Advance.

There is no evidence that any driver has ever sold or leased their route, and Halbert testified that he is not sure if drivers are permitted to do so. There was no testimony suggesting that any driver is operating as an incorporated business, but drivers are permitted to hire replacement drivers to perform their routes or extra drivers to perform other routes. The replacement/extra driver has to establish proof of insurance and must wear the uniform, described above. Importantly, however, no driver currently employs a replacement driver to execute his/her route and there is no evidence that any driver has ever hired extra drivers to perform other routes.

Weber testified to only one driver, James LeMay, having regularly used a replacement driver in the past. However, the record is silent concerning any details regarding the arrangement between LeMay and the replacement driver, including the frequency with which LeMay used the replacement, the length of time the replacement was used, and the amount of profit, if any, LeMay garnered from this arrangement.

Drivers may also use replacements to perform their routes on an intermittent basis when a driver cannot perform a route due to illness or vacations. The record reflects that the drivers will sometimes notify Weber when using a replacement, but it is not necessary. The Employer claims drivers can use other "contracted" drivers or anyone else whom they select. Young, however, testified that he did not know that he was permitted to use someone other than a contracted driver.

When drivers are not making deliveries for the Employer, they may use their vehicle for secondary employment, limited only by the non-competition provision in the lease agreement preventing a driver from servicing a customer of the Employer. The record shows that Sawyer has a contract mail route with the Post Office. Since obtaining the position with the Employer, she hired her daughter-in-law to perform the mail run. Sawyer does not profit on this arrangement. The record points only to one other driver who holds a second job, working at a golf course on the weekends.

Although it is clear that the Employer has never issued any type of formal discipline, the record reflects that the Employer has terminated leases with drivers for failing to show up for a route, not following the sequence, or for skipping stores on a route. A driver's failure to wear the mandated uniform might result in the Employer terminating a lease with a driver. Weber testified that he has received numerous complaints about Sawyer's attitude and behavior, that he has told her of these complaints, and warned that her lease would be terminated if the complaints continued. Weber has also spoken to Sawyer over her use of a car for deliveries, in contravention of company policy. Conflicting testimony was provided as to whether Weber has ever threatened a driver with being "fired." Sawyer said Weber has threatened to fire her. Young testified that he has heard Weber threaten to fire other drivers. Weber, on the other hand, says he has only threatened that he would terminate a driver's lease.

The Employer has limited contact with a driver during a route. Generally a driver will call the Employer only when a problem arises. Drivers are free to take breaks when they choose but this discretion is greatly limited by the schedule demanding that the driver be at each store by a certain time. And as the Employer noted, it distinguishes itself from other companies by the expedited nature of the transportation services it provides its customers.

Drivers cannot refuse to make a delivery without jeopardizing their lease agreements with the Employer. When a driver cannot make a delivery for some reason, the driver is expected to find a replacement. If a driver is unable to do so, advance notice must be provided to Weber so that he can obtain someone to perform the delivery.

V. Analysis

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The burden of establishing that an individual is an independent contractor falls on the party asserting independent contractor status. **BKN, Inc., 333 NLRB 143 (2001). In NLRB v. United Insurance Co. of America, 390 U.S. 254, 258 (1968)**, the Supreme Court held that in determining whether persons were employees or independent contractors the common law agency test should apply and "all the incidents of the relationship must be assessed and weighed with no one factor being decisive."

The Board in **Roadway Packaging System, 326 NLRB 842 (1998)**, expressly adopted the common law, multifactor, agency test described by the Restatement (Second) of Agency in determining whether an individual is an employee or independent contractor. Rejecting the assertion that that the controlling factor is whether an employer has a "right to control" the manner and means of the work, the Board held that no one factor in this multifactor analysis predominates. Rather, the common law agency test requires "a careful examination of all factors." Id. at 851. The Board reaffirmed its earlier finding outlined in **Austin Tupler Trucking, 261 NLRB183, 184 (1982)** that, "'not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And

though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in another.'"

Under the Restatement (Second) of Agency

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or independent contractor the following factors, among others, are considered:

(a) The extent of control the employer exercises over the individuals work details.

(b) Whether the person employed is engaged in a distinct operation or business.

(c) Whether the work of that occupation is usually performed under an employer's supervision.

(d) The skill required by the occupation.

(e) Whether the employer or the worker supplies the instrumentalities, tools and place of work.

(f) The length of employment.

(g) Whether payment is made according to the time spent or by the job.

(h) Whether the work is part of the employer's regular business.

(i) Whether the parties believe they are creating an employer-employee relationship.

(j) Whether "the principal is or is not in the business."

In **Roadway** the Board found the drivers to be employees. In so finding, the Board relied, in part, on the fact that the drivers did not operate independent businesses but were performing functions that were essential to the employer's normal operations; that drivers did not have a significant proprietary interest in their service areas; and had they had no significant entrepreneurial opportunity for economic gain or loss. The Board reached these conclusions even though drivers could sell their service area, utilize

replacement drivers, and were permitted and did hire other drivers to service a secondary service area.

The Board reached an opposite result in **Dial-A-Mattress, 326 NLRB 884 (1998)**, the companion case to **Roadway**. The Board found the drivers in **Dial-A-Mattress** did possess significant entrepreneurial opportunity for gain or loss, noting that some drivers had more than one van to perform deliveries, they could and did negotiate economic terms in their agreements with the employer, and they had no minimum guaranteed compensation. **Id. at 892**. Additionally, drivers could decline to work or make their trucks available to the employer without penalty. **Id. at 887**.

The Board has issued several decisions pertaining to independent contractor status since the **Roadway** and **Dial-A-Mattress** decisions issued and I will highlight a few having significance on this case. In **Slay Transportation Co., 331 NLRB 1292 (2002)**, the Board reversed a Regional Director's finding that owner-operator truck drivers were independent contractors. In that case, the owner-operators owned their tractors, were permitted to hire other drivers to perform their runs, could work for other employers, and could refuse job assignments. However, the Board found that other factors, including the fact that owner-operators performed functions at the core of the employer's business, there was no evidence the owner-operators ever negotiated special pay deals, and that owner-operators had little opportunity for significant financial gain or loss militated in favor of finding employee status. **Id. at 1294**.

In **AAA Cab Services, Inc., 341 NLRB No. 57 (2004)**, the Board found that taxicab drivers were independent contractors. In that case, the taxi drivers had real opportunities to significantly affect their income, and they were subject to very little control by the employer. Specifically, the taxi drivers were not paid any wages from the employer, were able to operate in any geographical location whenever and however long they wanted, could reject dispatches without penalty, and could set their own rates for non-dispatched fares.

In **BKN, Inc., 333 NLRB 143 (2001)**, the Board found that freelance writers, artists and designers were employees and not independent contractors despite several factors which militated in favor of independent contractor status, including, "the writers set their own hours; provide their own equipment and materials; are not subject to discipline; sign agreements to work on each episode; are paid per episode pursuant to invoices submitted to the Employer; may work for other employers; receive no benefits; and have no taxes or other payroll deductions withheld." **Id. at 144**. The Board based its finding of employee status, in part, on its conclusion that the employer exercised extensive controls over the writers by the imposition of deadlines and editorial review of the writers' work. **Ibid**. The Board also relied on the fact that the writers performed functions essential to the employer's normal operations and that, "when writing scripts for the [employer], they are working exclusively for the [employer]" and they, "have no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they are writing scripts for the [employer]." **Id. at 145**.

I have carefully considered all factors in the common law agency test and I am of the opinion that the evidence suggesting that the drivers are employees outweighs the evidence indicating independent contractor status. Below is my application of the common law agency test to the facts of this case.

Extent of Employer's Control over Work Details

The Employer controls several aspects of the drivers' daily duties and schedule. The Employer establishes drivers' routes, including, which stores are on each route, the number of stores on each route, and the order or sequence in which the stores on each route are served. The Employer may, and does, unilaterally alter the routes. A displeased driver's only apparent recourse to such a change is to terminate the lease agreement.

Drivers are also required to conform to a strict time schedule established by the Employer. Drivers are required to begin each route at a designated time--11:00 a.m. for the morning routes, and 2:00 p.m. for the afternoon routes. The Employer further mandates that drivers reach each Advance store by a certain time. The record discloses that the driver must arrive at the Advance warehouse to pick up the automotive parts for delivery and must return to the warehouse at the end of each route to drop off related paperwork. The Employer can, and has, terminated lease agreements with drivers who fail to meet these standards.

The Employer further requires that the drivers utilize a minivan or pickup truck for its deliveries. Drivers must also wear a uniform including a bright yellow shirt, preferably displaying the Employer's logo, and an ID badge. Moreover, drivers are expected to be neat in appearance, and are not permitted to wear sneakers and jeans. All drivers conform to this requirement. Indeed, the evidence reflects that failing to do so could subject the driver to a termination of the lease.

The Employer determines the pay that drivers will earn for completing a route. There is no evidence that a driver in the petitioned-for unit has ever successfully negotiated a change in compensation. The only example of a change in compensation between a driver and the Employer, which occurred in a different region, is not reflective of a meaningful negotiation since the driver did not have an opportunity, based on skill, timeliness, and good performance, to increase the pay. Rather, this example establishes that the Employer makes a simple factual analysis of road conditions and a determination that these conditions do not warrant an increase are presented on a take-it or leave-it basis.

Admittedly, the Employer does not control all the details regarding the performance of work. The driver does have control over the choice of a vehicle as long as it is a mini-van or pick-up truck, and is not required to display the Employer's logo on their vehicle. A driver is permitted to use a replacement driver to cover a route because of illness, vacations, etc. without the Employer's permission. A driver can choose which roads to take to get to each destination, but this is an exercise of minimal discretion, given the time requirements and the probability that most drivers will simply choose the

most efficient traffic pattern in order to reach each destination by the scheduled time. Similarly, the drivers' control over whether or when to take breaks is greatly curtailed by the expedited time schedule.

I find that the Employer exercises significant control over the details regarding the drivers' performance of the work and this factor, on balance, weighs strongly in favor of employee status. I disagree with the Employer's contention that since much of the control it exercises is based on the needs of its sole customer, that this control should not be attributed to the Employer. The controls which many Employers establish over employees, in all different types of industries, reflect to the Employers desire to satisfy their customers' needs. However, this does not alter the real effect that these controls have over employees.

Whether Drivers are Engaged in a Distinct Operation or Business

The drivers are not engaged in a distinct operation or business. Rather, the service they perform, the transportation of products, like in **Roadway**, is at the core of the Employer's Canton, Ohio operations. The Employer's claim that drivers operate a distinct business because drivers are in the business of transporting goods, and the Employer is in the business of "supply chain management," is belied by the record testimony in general and Halbert's testimony specifically. In explaining the Employer's Canton operations, Halbert testified that Advance had a need for a delivery service, "and we provide that reliable, expedited, predictable delivery service." Halbert further testified that the Employer distinguishes itself from other companies by, "the expedited nature with which we provide the transportation services."

The Employer allows drivers to obtain secondary employment but the record indicates that they cannot perform this second job while performing their routes for the Employer. Moreover, there is no evidence that any driver is incorporated. In **BKN, Inc., 333 NLRB 143 (2001)**, the Board found that writers, who were free to work for other employers, were not engaged in an independent business. In this connection, the Board held that *when* writers were writing scripts for the employer, they were working exclusively for the Employer and had to produce scripts that conformed to the Employer's specifications. **Id. at 145**.

I find the record evidence regarding this criterion demonstrates that drivers are not engaged in a distinct operation or business and weighs in favor of employee status.

Whether the Work is Usually Performed Under the Employer's Supervision

The record reveals that the Employer does not train drivers, provide any sort of handbook, and that the drivers generally do not have much contact with the Employer while they make deliveries. Drivers are not required to call in after each delivery, for example. However, the drivers are required to have a cell phone in the event a problem arises. Although there does not appear to be much day-to-day supervision by the Employer, the type of work involved here is typically not the sort that requires close

supervision. The work is performed away from any company facility, is routine in nature, and requires minimal skill, and therefore, the need for oversight is limited.

The Employer does not issue any formal discipline but does monitor drivers' work to some degree. In this regard, Weber has telephoned a driver when fearing that the driver will not arrive by the designated launch time. He has spoken to Sawyer on more than one occasion over complaints he has received from Advance concerning her behavior and attitude and has tried to alter this behavior by either threatening to fire her or by threatening to terminate her lease agreement. In fact, the Employer has terminated drivers' leases for failing to show up, failing to follow the correct sequence and for skipping stores on a route.

I determine that the evidence pertaining to this factor does not weigh strongly in favor of either employee or independent contractor status.

Required Skills

The work performed by the drivers does not require any particularized skill. Drivers must have a satisfactory driving record, devoid of a DUI, a reckless operation infraction, and "too many" points. There is no special training given or warranted. The driver must be able to drive, be reliable, dependable and timely. I am persuaded that this factor supports a finding of employee status due to the lack of any specialized skills needed to perform this work.

Whether the Employer or Driver Supplies the Instrumentalities, Tools, and Place of Work

Drivers are responsible for having a workable vehicle for the performance of their duties, and must meet the Employer's specification that it be a minivan or pick-up truck. The Employer has no ownership interest in these vehicles nor does the Employer provide any financial assistance in obtaining them. Drivers obtain and pay for their insurance. They are also solely responsible for maintaining and repairing their vehicles. Drivers pay for their fuel, subsidized by a fuel surcharge. Drivers must purchase the cell phone that is required by the Employer. However, drivers report to the Advance warehouse at the beginning and end of each run in order to pick up the product for delivery and to drop off related paperwork. The Employer provides the drivers with the uniform shirt, but the driver must purchase it.

Although the Employer provides drivers with a fuel surcharge and uniform tops, and drivers must begin and end each route at a location essentially provided by the Employer, I find that the totality of the evidence regarding this factor, in particular, that drivers provide their principal tool, the vehicle, supports a finding of independent contractor status.

Length of Employment

The Employer commenced operations in the Canton, Ohio area in February 2002. The record does not reflect how long each of the 13 drivers has worked for this Employer. However, Sawyer and Young have been with the Employer since it began its Canton operation, and from reviewing the settlement reports and the 2002 tax forms, it appears that 5 of the 10 drivers, for whom settlement reports were submitted, worked for the Employer in 2002. Additionally, Halbert testified that driver turnover rate is very low for the type of service the Employer provides Advance.

I find the evidence pertaining to this factor, on balance, favors a finding of employee status. Although the record does not disclose the length of service for each driver, several current drivers have worked for the Employer since 2002, the year the Employer began operations. This evidence, in conjunction with Halbert's testimony that the turnover rate for this type of work is very low, reflects the type of longevity with the Employer that is indicative of an employer-employee relationship.

Whether Payment is Made According to Time Spent or by the Job

The Employer sets the rate of pay that a driver earns for each route. This amount, on average, constitutes about 60 percent of the amount Advance pays to the Employer. Contrary to the Employer's assertion, drivers have no significant opportunity for economic gain or loss. In this regard, drivers have no control over the amount that the Employer charges Advance for each route. As noted above, the evidence reveals that no Canton driver has ever negotiated a higher pay rate. The Employer services only one customer, thereby preventing the driver from garnering more money by adding customers.

Halbert testified that he was not sure if drivers could sell their routes and there is no evidence that any driver has done so. A driver may hire other drivers to complete his route or another route, if one becomes available, but the driver can only negotiate the extra driver's wages within the compensation rate set by the Employer. The evidence indicates that only one driver has ever apparently hired another worker and there is no information as to whether this served to materially advantage the driver. In this regard, the Board in **Time Auto Transportation, 338 NRLB No. 75 (2002)**, and in **Slay Transportation, 331 NLRB 1292, 1294 (2000),** found that the drivers in both cases did not possess any significant opportunity for material gain, despite the fact that they could hire extra drivers. In so finding, the Board relied on the fact that the drivers could only negotiate the extra driver's wages in the context of the compensation rate set by the employers. In **Time Auto Transportation**, the Board also noted that in the instance of a driver who hired an extra driver, the driver at issue lost money.

The Employer contends that the drivers have an entrepreneurial stake in the work, since they can reduce costs by saving on expenses, including fuel costs, car maintenance expenses, insurance, tolls, and traffic tickets. The drivers' ability to reduce these costs is not indicative of entrepreneurial enterprise and ingenuity of a true independent contractor. Like the drivers in **Slay Transportation**, who owned their vehicles and were responsible

for all incidental costs and operating expenses, I find that there is "little economic independence realized" by these drivers. **Slay Transportation at 1294**. See also, **Community Bus Lines, 341 NLRB No. 61, slip op. at 10 (2004)**.

Unlike the drivers in **Dial-a-Mattress, 326 NLRB 884 (1998)**, here the drivers are guaranteed a minimum (and maximum) amount of pay for completing a route. Drivers cannot refuse to accept a load nor can they simply elect not to show up (or obtain a substitute) without jeopardizing their lease agreements with the Employer. The record is clear that the Employer has terminated drivers' leases for failing to make a delivery and for skipping stores on a route. Drivers are, however, liable for products damaged in transit, and under some circumstances, for missing parts.

The Employer asserts that contractors can determine a profit and loss by adding or subtracting routes. However, the Employer has only 12 established routes. Obviously, the ability of a driver to obtain an additional route is wholly dependent on a route becoming available, and is limited by the economic confines earlier described.

I conclude that the evidence regarding this factor strongly favors a finding of employee status. Although drivers are not paid hourly, there is little opportunity for entrepreneurial gain or loss, and this lack of ability to significantly affect earnings is reflective of an employer-employee relationship.

Whether the Work is Part of the Employer's Regular Business

The drivers' work is an essential part of the Employer's regular business. The Employer provides some warehousing and distribution services for Advance, but it is clear that the Employer's core function is to provide for the transportation of parts and other miscellaneous items from Advance's warehouse to its retail stores and from one retail store to another. I must reject the Employer's argument that drivers do not perform an essential function of the Employer's business because the Employer provides "supply chain management services" and not transportation services. This simply does not ring true in light of the entire record, and in view of Halbert's testimony that the Employer distinguishes itself from other companies by, "the expedited nature with which we provide the transportation services." Halbert further testified that Advance had a need for a reliable delivery service, "and we provide that reliable, expedited, predictable delivery service." Certainly, the drivers at issue perform an essential function that is at the very core of the Employer's business.

Nor do I agree with the Employer's suggestion that the Board's finding in **Slay Transportation Company, 331 NLRB 1292 (2000)**, warrants a contrary conclusion. The Employer points out that it does not employ any non-contracted drivers; and that the Board in **Slay Transportation**, in finding that drivers performed an essential function for the employer, noted that the drivers performed the same core function as the employer's employee drivers. The fact that the employer in **Slay Transportation** had its own driver workforce was not controlling in the Board's finding that the "contracted" drivers

performed an essential function; it was simply used for comparison purposes. Indeed, the Board in **Slay Transportation** reasoned that drivers performed a core function for the employer because they, "transport chemicals solely for **Slay Transportation**, a company whose core function is the transportation of such products for its customers." The same reasoning applies here. **Id. at 1294**. The drivers transport automotive parts for the Employer, a company whose core function is the transportation of such products for its customer.[5]

I conclude that the record evidence regarding this factor weighs heavily in favor of finding employee status.

Whether Parties Believe They are Creating and Employer-Employee Relationship

The record discloses that there are numerous documents provided to the drivers specifically classifying them as independent contractors or that, at the very least, would likely suggest this status. Specifically, the lease agreement clearly defines the drivers as independent contractors as do other forms signed by the drivers during the interview process. Moreover, the settlement checks and reports issued to drivers reveal that the Employer does not withhold taxes. Additionally, drivers are annually issued 1099 forms. In this connection, Sawyer testified to completing tax forms applicable to self-employed persons.

With regard to the relationship the parties believed they were creating, I conclude that the evidence relating to this factor favors a finding of independent contractor status. The record testimony that the employer does not routinely provide a copy of the lease agreement to drivers, and that Weber has apparently ignored drivers' requests to obtain a copy, does not alter my finding.

Whether the Employer is in the Business

The Employer is certainly in the business of transporting parts despite the Employer's assertions to the contrary. The Employer, as Halbert explains, provides Advance with a "reliable, expedited, predictable delivery service." And the drivers, in fact, are to execute this service by delivering the parts in a reliable, expedited and predictable manner. I find that the evidence regarding this criterion favors a finding that the drivers are employees.

Summation

Based on the foregoing, the record as a whole, and upon careful review of the post hearing briefs, I find the Employer has failed to meet its burden of establishing the drivers are independent contractors. Moreover, I find that the unit of drivers sought by the Petitioner is appropriate for the purposes of collective bargaining. Accordingly, I will direct an election among the employees in such a unit.

[5] In contrast, the drivers in **Dial-A-Mattress**, who were found to be independent contractors, did not perform work at the core of the Employer's business, which was sale and distribution of mattresses.

VI. Exclusions

The parties stipulated, and I find, that Kevin Weber, possessed with the authority to hire employees, is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, I will exclude him from the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL 92 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).** Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by November 16, 2004.

Dated at Cleveland, Ohio this 2nd day of November 2004.

/s/ [Frederick J. Calatrello]

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Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8